

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANGELA L. SEASTROM

Claimant

VS.

STATE OF KANSAS

Respondent

AND

SELF-INSURANCE FUND

Insurance Carrier

Docket No. 262,699

ORDER

Respondent appeals Administrative Law Judge Brad E. Avery's May 25, 2001, preliminary hearing Order for Compensation.

ISSUES

The Administrative Law Judge (ALJ) granted claimant's request for medical treatment and temporary total disability compensation. The ALJ found claimant proved she suffered an accidental injury that arose out of and in the course of her employment with respondent. The ALJ further found claimant failed to give respondent notice of the accident within 10 days but established just cause within 75 days for the reason of not giving the 10 day notice.¹

On appeal, respondent requests the Appeals Board (Board) to reverse the ALJ's preliminary hearing order. Respondent contends claimant failed to prove she suffered an accidental injury that arose out of and in the course of her employment with respondent. But respondent only argues the timely notice issue in its brief before the Board. Respondent contends claimant failed to give respondent timely notice of the accident within 10 days and further failed to establish just cause within 75 days for not giving the 10 day notice.

In contrast, claimant requests the Board to affirm the ALJ's preliminary hearing order.

¹ See K.S.A. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record, and considering the parties' briefs, the Board makes the following findings and conclusions:

Sometime in the spring or early summer of 2000, claimant testified she experienced pain and discomfort in her right lower rib cage area while working for respondent. At that time, claimant was employed by respondent as lead worker responsible for maintaining the parking lots, grass, trees, shrubs and flowers of the State Capitol complex grounds.

The claimant first experienced pain and discomfort while she was shoveling and moving dirt by a wheelbarrow. The pain then continued off and on as she performed the physical work duties required of her job until she was taken off work by her primary physician, Gerald W. Marcell, M.D., on August 22, 2000.

Dr. Marcell's initial assessment was gallbladder disease, viral gastroenteritis or possibly peptic ulcer disease. Dr. Marcell had some diagnostic laboratory tests completed and then referred claimant to Robert Ricci, M.D. Dr. Ricci determined claimant's problem was not related to gallbladder disease or gastroenterological problems. Dr. Ricci diagnosed claimant with intercostal nerve pain and referred claimant to an anesthesiologist for intercostal nerve blocks. After claimant had the first nerve block, she was released to return to light work.

Claimant returned to work on September 7, 2000. She was assigned to work with another worker to cut up tree limbs and haul the limbs away that had fallen the night before as the result of a storm. The claimant attempted to perform those physical work duties but had to quit after only two hours because of the pain in her ribs and nausea. She reported the problems to her supervisor, Les Paul, who sent claimant home.

Claimant was again taken off work and underwent a series of nerve blocks. The fourth nerve block of the series caused claimant's lung to collapse. Claimant was treated for the collapsed lung by Dr. Thoms.

After claimant recovered from the collapsed lung, she was referred to physical medicine and rehabilitation physician Sharon L. McKinney, D.O. Dr. McKinney first saw claimant on October 5, 2000. Dr. McKinney's initial impression was possible intercostal nerve tear that was healing with a neuroma. She suggested that claimant be placed in physical therapy program of phonophoresis therapy daily for one week.

Because claimant did not improve with the therapy, Dr. McKinney had her undergo an MRI examination and continued her on pain medication. The results of the MRI examination were normal except for a renal cyst that would not have attributed to claimant's pain. The doctor's impression now was likely strained or partially torn ligaments

or muscles around the intercostal nerves which were healing with scar tissue causing claimant's pain and discomfort. Dr. McKinney attributed the pain most likely to claimant's work activities while employed by the respondent. Dr. McKinney referred claimant for manipulation treatment with chiropractor Dr. Boehr. Dr. McKinney also referred claimant for further follow up medical treatment with Joseph G. Sankoorikal, M.D. because she was in the process of retiring from her medical practice.

Claimant's supervisor, Les Paul, called claimant sometime in October 2000, and notified her that she needed to call a John Collins in the human resources department about her absences because he was fearful that she was going to be terminated. Claimant testified she talked to Mr. Collins over the telephone sometime around the middle of October. At that time, she told Mr. Collins that Dr. McKinney thought her problems were related to her work and she would not be able to return to work for a long period of time. Claimant testified that Mr. Collins then discussed with the claimant temporary total disability compensation. After the telephone conversation, on October 25, 2000, claimant received a termination letter from respondent.

Claimant's supervisor, Les Paul, also testified at the preliminary hearing. Mr. Paul acknowledged that he knew claimant was having health problems but he did not know claimant's health problems were related to her work. He also testified that claimant did not notify him that her health problems were work-related. He did not know that claimant was making a claim that her injuries were work-related until he saw a letter from claimant's attorney dated February 1, 2001. Mr. Paul, however, did admit that when claimant returned to work on September 7, 2000, she had to quit work, after only two hours, because her work activities were causing her pain and nausea.

The Board concludes that claimant's testimony and Dr. McKinney's November 1, 2000, medical report proves that claimant's work activities while employed by respondent more likely than not strained or partially tore ligaments and muscles around the intercostal nerves resulting in healing scar tissue causing claimant pain and discomfort.

Respondent argues claimant failed to give notice that she was claiming a work-related injury until the February 1, 2001, letter was received from claimant's attorney. The Board disagrees with respondent. The Board affirms the ALJ's finding that claimant, on the advise of her supervisor, telephoned John Collins, an employee of respondent's human resources department, in mid October of 2000. During that telephone conversation, claimant discussed with Mr. Collins, Dr. McKinney's opinion that her continuing pain and discomfort in her rib area was related to her work activities. At that time, Mr. Collins discussed temporary total disability compensation with claimant.

Thus, the Board finds, based on the nature of claimant's injury which was very difficult to diagnosis, it was reasonable for claimant not to conclude, until informed by Dr. McKinney, that her pain and discomfort were related to her work. Thus, the Board

concludes claimant had just cause for not providing respondent with notice within 10 days from September 7, 2000, the last day claimant worked and suffered injury caused by her work activities. Furthermore, the Board finds claimant provided respondent with notice of a work-related accident within 75 days when she discussed Dr. McKinney's opinion that claimant's condition was related to her work with Mr. Collins in mid-October 2000.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Brad E. Avery's May 25, 2001, preliminary hearing Order for Compensation should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

c: Neil Dean, Topeka, KS
Marcia L. Yates, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director